LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 24 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 688

JOHN T. DAVIS,

Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM T. FITZGERALD,
817 Southern Securities Building,
Evansville, Indiana.
Counsel for Respondent, Louisville and Nashville Railroad Company.

Of Counsel:
WILLIAM L. GRUBBS,
908 West Broadway,
Louisville, Kentucky.

ISADORE J. FINE,
JOEL S. HATFIELD,
CHARLES H. SPARENBERGER,
EUGENE P. FINE,
Suite 405 Citizens Bank Building,
Evansville, Indiana.
Counsel for Respondent, Chicago and Eastern Illinois Railroad Company.

Of Counsel:
GERALD J. O'ROURKE, JR.,
646 Chicago Road,
Chicago Heights, Illinois.

EDWARD E. MEYER,
Suite 405 Citizens Bank Building,
Evansville, Indiana.

INDEX

	PAGE
Opinion below	1
Correction of Petitioner's Statement of Jurisdiction	2
Grounds for Denying the Writ	2
Argument	4

CITATIONS.

Arnold v. Panhandle & Santa Fe Railway Company, 1957, 353 U. S. 360, 1 L. Ed. 2d 889	7
In Re: Aurora Gaslight Coal & Coke Commission, 1917, 186 Ind. 690, 691; 115 N. E. 673	6
Automobile Underwriters, Incorporated v. Amando Smith, 1961, Ind. , 171 N. E. 2d 823, 824	6
Brown v. Western Railway of Alabama, 1949, 338 U. S. 294, 94 L. Ed. 100, 70 S. Ct. 105	6
Dice v. Akron, Canton & Youngstown Railroad Company, 1952, 342 U. S. 359, 96 L. Ed. 398, 72 S. Ct. 312	7
Dorweiller, et al. v. Sink, 1958, 238 Ind. 368, 151 N. E. 2d 142	6
Hanley v. Mason, 1908, 42 Ind. App. 312, 325, 85 N. E. 381	6
Humble Oil & Refining Co. v. Campbell, 1933, 292 U. S. 648, 78 L. Ed. 1498, 54 S. Ct. 860	5
State Bd. of Tax Commrs., et al. v. Stanley, et al., etc. 1952, 231 Ind. 338, 340, 108 N. E. 2d 624	6

STATUTES.

28 U. S. C. A. 2101 (c)	3
Sec. 4-215 Burns' Indiana Statutes Annotated, 1933 (1946 Replacement)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 688.

JOHN T. DAVIS,

Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION BELOW

The opinion of the Appellate Court of Indiana (Petition, Appendix B, page 13 is reported at 173 N. E. 2d 749.

Respondents respectfully submit that certain statements of the record below as contained under petitioner's heading "Jurisdiction", require correction.

CORRECTION OF PETITIONER'S STATEMENT OF JURISDICTION

Under the heading "Jurisdiction" appearing at page 2 of the petition it is stated that a timely and proper petition for rehearing was filed in the Appellate Court of Indiana, on April 27, 1961, and that a timely and proper petition to transfer was filed in the Supreme Court of Indiana, on May 31, 1961. Respondents state that the petition for rehearing was not proper but on the contrary was insufficient and said petition was dismissed for failure to comply with Rule 2-22 of the Supreme Court of Indiana, as shown by the Appellate Court's ruling on the petition for rehearing as set out in the petition for certiorari, in appendix B, at page 28. Nor was a proper petition to transfer to the Supreme Court of Indiana filed for the reason that a condition precedent to such petition to transfer is the prior filing of a proper petition for rehearing and a denial of such petition as provided in Rule 2-23 of the rules of the Supreme Court of Indiana, as set out in the petition for certiorari, appendix C, page 29.

GROUNDS FOR DENYING THE WRIT

I.

Petitioner has failed to take the necessary steps to justify this Court in assuming jurisdiction for each of the following reasons:

1. The petition for writ of certiorari fails to comply with Rule 23-1(c) of the Rules of this Court for the reason that the "Statement" appearing at page 6 of the petition does not contain a concise statement of the case including the facts material to the consideration of the questions presented, as required by said rule but is a mere statement of the nature of the action, *i.e.*, that the complaint was filed

by the petitioner and asserting that the cause of action arose under the Federal Employers' Liability Act.

2. The petition for writ of certiorari fails to comply with Rule 23-1(f) of the Rules of this Court in that the petition does not contain petitioner's complaint or respondents' demurrers thereto or quotations of such pleadings or summary thereof nor has petitioner filed a printed record or caused such pleadings to appear in the appendix to the petition.

3. The petition for writ of certiorari was not timely filed in that the judgment of the Appellate Court was entered April 10, 1961, and the petition for writ of certiorari was not filed in this Court within ninety (90) days thereafter, as required by 28 U. S. C. A. 2101 (c). The decision of the Appellate Court of Indiana became final on April 10, 1961, the Supreme Court of Indiana being without jurisdiction to review the same for the reason that a proper petition for rehearing was not filed and presented to the Appellate Court of Indiana, in accordance with the direction of the statutes of Indiana and the rules of the Supreme Court of Indiana. An improper and insufficient petition for rehearing in the Appellate Court of Indiana is ineffective to toll the running of said period.

II.

1. The petition for writ of certiorari fails to establish that the decision and judgment of the Appellate Court of Indiana in the instant case is inconsistent with or contrary to the decisions of this Court.

2. Petitioner, being an employee of the respondent, Louisville and Nashville Railroad Company, there can be no liability upon the respondent, Chicago and Eastern Illinois Railroad Company, under the Federal Employers' Liability Act.

ARGUMENT

I.

It is respectfully submitted that the petitioner has failed to comply with the rules of this Court, and particularly Rule 23-1 (c) and Rule 23-1 (f).

Petitioner's statement of the case is nothing more or less than a statement of the nature of the original action. It advises this Court that a complaint was filed by petitioner in the Superior Court of Vanderburgh County, Indiana, seeking to recover under the Federal Employers' Liability Act. There is no effort on the part of the petitioner to cause his petition to contain a statement of facts material to the consideration of the questions purportedly presented nor does the petition contain such pertinent quotations of specific portions of the record or a summary thereof sufficient to show that a federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. In short, petitioner is seeking to have this Court review the complaints originally filed in the Superior Court of Vanderburgh County, Indiana, but at no point does the petitioner furnish this Court with a copy of the petitioner's original or amended complaints, nor a copy of respondents' demurrers addressed thereto, from which this Court can determine the content and effect of said pleadings; nor does petitioner seek to comply with the rule either by filing nine (9) copies of the printed record below or by including said pleadings or portions thereof in an appendix to the petition.

The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and

adequate understanding of the points requiring consideration will be sufficient reason for denying his petition.

Supreme Court of the United States, Revised Rules, Rule 23-4.

A petition for certiorari will be denied where there is a failure to comply with the rules.

Humble Oil & Refining Co. v. Campbell, 1933, 292 U. S. 648, 78 L. Ed. 1498, 54 S. Ct. 859.

Petitioner concedes by his statement under the heading "Jurisdiction" at page 2 of the petition, that the petition for rehearing filed in the Appellate Court of Indiana was dismissed. A copy of the ruling of the Appellate Court of Indiana upon the petition for rehearing is set out in appendix B, page 28 of the petition, from which it appears that the petition for rehearing was dismissed because of a failure to comply with Rule 2-22 of the Supreme Court of Indiana, which rule is set out in appendix C, page 29 of the petition. Appendix C, page 29 of the petition also contains a copy of Rule 2-23 of the Indiana Supreme Court Rules, from which it appears that a petition for transfer to that Court is contingent upon the petitioner first filing a proper petition for rehearing in the Appellate Court of Indiana, and a denial of such petition. The jurisdiction of the Appellate Court of Indiana becomes final unless a proper petition for rehearing is filed and presented to it in accordance with statutory direction and the jurisdiction of the Supreme Court of Indiana can not be invoked, as it has no authority to review a decision of the Appellate Court of Indiana where a proper petition for rehearing has not been filed and presented to the Appellate Court of Indiana in accordance with statutory direction and in accordance with the rules of the Supreme Court of Indiana.

See, 4-215 Burns' Indiana Statutes Annotated, 1933, (1946 Replacement).

In re: Aurora Gaslight Coal & Coke Commission, 1917, 186 Ind. 690, 691; 115 N. E. 673;

Dorweiller, et al. v. Sink, 1958, 238 Ind. 368, 151 N. E. 2d 142;

Automobile Underwriters, Incorporated v. Amondo Smith, 1961, Ind. , 171 N. E. 2d 823, 824;

State Bd. of Tax Commrs., et al. v. Stanley, et al., etc., 1952, 231 Ind. 338, 340, 108 N. E. 2d 624.

The petitioner's petition for a rehearing having presented no question for the consideration of the Appellate Court of Indiana, was, in reality, no petition and was properly dismissed.

Hanley v. Mason, 1908, 42 Ind. App. 312, 325, 85 N. E. 381.

It, therefore, follows that the petitioner herein has failed to take the proper steps under the rules of the Indiana Supreme Court, which might otherwise toll the running of the period within which petitioner might have filed his petition for writ of certiorari in this Court. There having been no tolling of the running of such period, it therefore appears that the petition for a writ of certiorari dated January 31, 1962, was not filed within ninety (90) days from the date when the finality of the judgment of the Appellate Court of Indiana for purposes of review was established.

II.

Petitioner has asserted that the judgment of the Appellate Court of Indiana, is a disavowal of the rule laid down in *Brown v. Western Railway of Alabama*, 1949, 338 U. S. 294, 94 L. Ed. 100, 70 S. Ct. 105. The opinion of the Appellate Court of Indiana does not sustain petitioner's assertion. Nowhere does it appear in the petition that

the lower court invoked a rule of pleading that interfered with any federally created right. Although the opinion comments in part upon the rules of pleadings under the Indiana practice, nevertheless the opinion recognizes and the case is determined under the Federal Employers' Liability Act and the pronouncements of the federal courts interpreting that Act, with ample citation of authority. The Indiana Appellate Court in its opinion, as reported in 173 N. E. 2d 749 at page 754, stated:

> "Under the Act (Federal Employers' Liability Act) the negligence referred to is common law negligence."

Thereafter the Court said further at page 757:

> "Appellant has made a valiant attempt to present a a cause of action herein. However, we are restrained by the accepted rule of the common law from upholding this complaint. We know of no statute or judicial decision which places an affirmative duty upon these appellees to require a workman for hire to take a physical examination before going to work or before returning to work from an illness."

Stripped of its verbiage, the crux of the plaintiff's complaint is that the plaintiff became ill and was required to lose time from his job and thereafter the employer acquiesced in his seeking to return to his job, without requiring a physical examination. Accepting the petitioner's superior knowledge of his physical condition does not constitute negligence, which is essential to a cause of action under the Federal Employers' Liability Act.

The petitioner cites *Dice* v. *Akron, Canton & Youngstown Railroad Company*, 1952, 342 U. S. 359, 96 L. Ed. 398, 72 S. Ct. 312, and *Arnold* v. *Panhandle & Santa Fe Railway Company*, 1957, 353 U. S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840, which have no application in the instant case. The State Court in the *Dice* case, held that the Ohio, not federal, law governed and the *Arnold* case held that the

assertion of federal rights when plainly and reasonably made, is not to be defeated under the name of local practice. As pointed out above, the Appellate Court of Indiana based its decision upon the Federal Employers' Liability Act, as interpreted by the federal courts and not upon local practice.

Petitioner's discussion of "Waiver", which appears at page 10 of his petition, leaves respondents somewhat uncertain as to what is intended. The discussion does serve however, to illustrate the importance of Rule 23-1(e) and (f) of this Court and a reason for the denial of the petition under Rule 23-4. In the petition for certiorari it appears under the headings "Statement" and "How Federal Question is Presented" that the petitioner filed a complaint in the Superior Court of Vanderburgh County, Indiana, and thereafter filed an amended complaint and a second amended complaint. It further appears that respondents' demurrers to the amended complaint were sustained, which ruling was reconsidered and the demurrers again sustained. That second amended complaint was stricken on respondents' motion and the petitioner refiled his amended complaint, to which the respondents again refiled their separate demurrers, which were still again sustained. The petition for the writ does not contain either a copy or a summary of any of those pleadings and petitioner has, therefore, failed to comply with the requirement of this rule to present to the Court those things essential to a ready and adequate understanding of the points requiring consideration by this Court.

In addition, and as to the respondent Chicago and Eastern Illinois Railroad Company, it appears from the complaint filed in the Superior Court of Vanderburgh County, Indiana, that petitioner was an employee of the respondent, Louisville and Nashville Railroad Company and at times worked upon cars of the respondent, Chicago and

Eastern Illinois Railroad Company, pursuant to an agreement between the two companies, which allegation is in sufficient as against the respondent Chicago and Eastern Illinois Railroad Company.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM T. FITZGERALD,
817 Southern Securities Building,
Evansville, Indiana,
Counsel for Respondent, Louisville and Nashville Railroad Company.

Of Counsel:
WILLIAM L. GRUBBS,
908 West Broadway,
Louisville, Kentucky.

ISADORE J. FINE,
JOE S. HATFIELD,
CHARLES H. SPARFENBERGER,
EUGENE P. FINE,
Suite 405 Citizens Bank Building,
Evansville, Indiana,
Counsel for Respondent, Chicago and Eastern Illinois Railroad Company.

Of Counsel:
GERALD J. O'ROURKE, JR.,
646 Chicago Road,
Chicago Heights, Illinois.

EDWARD E. MEYER,
Suite 405 Citizens Bank Building,
Evansville, Indiana.